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In The

Supreme Court of the United States

October Term, 1990

JAYNE BRAY, et al.,

Petitioners,

v.

ALEXANDRIA WOMEN'S HEALTH CLINIC, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF CONCERNED WOMEN FOR AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

I. WHETHER 42 U.S.C. § 1985(3) AS ENACTED IN 1871 WAS INTENDED TO APPLY TO ANY CLASS OF PERSONS COMING WITHIN ITS PURVIEW WHERE STATE AND LOCAL AUTHORITIES ARE AFFORDING SUCH CLASS ADEQUATE PROTECTION OF THEIR CIVIL RIGHTS?

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INTEREST OF THE AMICUS CURIAE

Concerned Women for America ("CWA") is a national, non-profit membership organization representing approximately 700,000 people. CWA's purpose is as follows:

[1] Counsel of Record for the parties in this case have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court pursuant to Rule 37.3.

> The purpose of CWA is to preserve, protect and promote traditional and Judaeo-Christian values through education, legal defense, legislative programs, humanitarian aid, and related activities which represent the concerns of men and women who believe in these values.

One of the foremost concerns and desires of CWA is to protect the lives of the unborn. CWA is also concerned with the increasing federal intervention in matters which lie with the province of the individual states.

STATEMENT OF THE CASE

Amicus Curiae adopts the factual presentation set forth in Petitioners' Statement of the Case.

SUMMARY OF ARGUMENT

The legislative history surrounding the passage of the Ku Klux Klan Act establishes that an indispensable element for the application of § 1985(3) is the inability or unwillingness of the states to protect the rights of a particular class of their citizenry. If the states are affording their citizens adequate protection, § 1985(3) may not be used to invoke federal action. Both th Commonwealth of Virginia and the states throughout the Union generally are providing women who seek abortions all the protection they require in exercising the rights which they claim in that regard. Since § 1985(3) precludes federal interference except where the states have clearly and

persistently failed to act, it follows that federal intermeddling in instances such as that presented in the present case is unwarranted.

ARGUMENT

INTRODUCTION

42 U.S.C. § 1985(3) is an important legislative tool for use in combating conspiracies of insurrection against legitimate government authority. The scope of § 1985(3) was expressed by Congress when enacting its predecessor, the Civil Rights Act of 1871, otherwise known as the "Ku Klux Klan Act." As this Court stated in *Griffin v. Breckenridge*, 403 U.S. 88, 96 (1971), the meaning of § 1985(3) and what the statute encompasses "is confirmed by judicial construction of related laws, by the structural setting of § 1985(3) itself, and by its legislative history."

It is necessary carefully to analyze the historical genesis of § 1985(3) and to review closely Congress's intent in enacting it so as to guard against the error of concluding that it creates a federal tort law where none previously existed. *United Brotherhood of Carpenters and Joiners of America v. Scott*, 463 U.S. 825 (1983) (*"Carpenters"*). In *Carpenters*, this Court found "that the bill did not provide a federal remedy for 'all tortious, conspiratorial interferences with the rights of others.' " 463 U.S. at 834 (citations omitted). In *Griffin v. Breckenridge*, 403 U.S. 88, 101-102 (1971), this Court was careful to point out that the statute is not meant to apply to "all tortious, conspiratorial interferences with the rights of others" and must not become a "general federal tort law." However,

§ 1985(3) does become a general federal tort law if all that is required to invoke it is an allegation in federal court that there exists a possibility that a group of people will be deprived of civil rights.

The legislative history of § 1985(3) shows that Congress was concerned about the lawlessness in the post-bellum South and enacted the Ku Klux Klan Act as a means of enforcing civil rights where the Southern States would not.[2] Additionally, Congress was looking to control specific white groups who were terrorizing blacks and their supporters. Essentially, § 1985(3) was an answer to the insurrectionary states resisting reconstruction. It was a statutory mechanism invoked only under the dire circumstances where a state could or would no longer protect the rights of its citizens.

The lack of state enforcement to protect civil rights, which triggers this statute into action, is lacking in this case. The Commonwealth of Virginia has not dissembled into a lawless anarchy threatening the existence of the Union. Neither are Virginia's courts or police unwilling to or incapable of enforcing the state trespass laws (or any other state statutory controls at their disposal) against Operation Rescue. Nor does Operation Rescue threaten the Commonwealth of Virginia with insurrection. Therefore, § 1985(3) was improperly invoked by the federal district court to assume jurisdiction over this case.

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[2] *See* Cong. Globe, 42d Cong., 1st Sess, at app. 153 (1871) (remarks of Rep. Garfield) (supporting provision in the Civil Rights Act of 1871 ensuring equal protection to black suffrage supporters when Southern States are unable or unwilling to control interference with the administration of laws.)

Before the Fourteenth Amendment was drafted and adopted, Congress recognized the need for immediate legislation to protect and extend the rights of newly-freed slaves.[3] The Civil Rights Act of 1871 was enacted by the Forty-second Congress in response to a reign of terror and destruction by the Ku Klux Klan in the Southern States.[4]

This reign of terror fell not only upon blacks, but also upon those who supported reconstruction. Republican officeholders were in particular danger of the Klan's terrorism. Senator Osborn, for example, cited cases of the assassinations within a single year of two successive clerks of the Court of Jackson County, Florida, both of whom were Republicans. In addition to these two, Osborn asserted, "seventy two others have fallen by assassination in the same county, all Republicans, and yet

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[3] *See e.g.*, Cong. Globe, 39th Cong., 1st Sess. 474 (1866).

[4] "There can be no doubt that the Klan and other secret societies were guilty of innumerable crimes and that their secrecy was often a cloak for lawlessness and outrages directed against blacks and even recalcitrant whites. Thus, the Ku Klux Klan investigation of 1871 reported 153 blacks murdered in a single Florida county that year; over 300 murdered in parishes outside New Orleans; bloody race riots in Mississippi and Louisiana; a reign of terror in parts of Arkansas; in Texas, 'murders, robberies and outrages of all kinds.' " 2 S. Morrison & H. Commanger, *The Growth of the American Republic* 46 (5th ed. 1962), quoted in Note, *The Reach of 42 U.S.C. § 1985(3): Sex Discrimination as a Gauge*, 25 Clev. St. L. Rev. 331, 332 (1976). The other secret organizations included the Knights of the White Camelia, the White Brotherhood, and the Pale Faces. Comment, *A Construction of Section 1985(c) in Light of its Original Purpose*, 46 U. Chi. L. Rev. 402, 407-08 (1979).

no criminal has been punished for this slaughter." Cong. Globe, 42d Cong., 1st Sess., at 654 (1871).

Because of the "southern outrages," the second section of the Ku Klux Klan Act as originally proposed provided criminal sanctions for conspiracies to commit certain crimes which denied a person his rights, privileges and immunities under the Constitution or laws of the United States.[5] The Forty-second Congress was so concerned with possible conspiracies to overthrow legitimate authorities and reconstructionist policies that sections 3 and 4 of the original Act provided for the extraordinary remedy of martial law and suspension of the writ of habeas corpus to avert them. 17 Stat. 14, §§ 3, 4 (1871).

The scope of activities proscribed by the statute is suggested by the conspiratorial acts enumerated in section 2 of the original Act. These included conspiracies to overthrow or oppose by force the government of the United States, to seize United States property, to injure United States officials on account of or during the discharge of their duties, to deter witnesses or jurors from performing their functions, to hinder the course of justice in state or territorial courts, or to injure any person for enforcing the equal protection of the laws. 17 Stat. 14 § 2 (1871). Although § 1985(3) does not include all these specific offenses, the full range of conspiracies prohibited by the 1871 Act taken as a whole illuminates the original tenor of the language codified in the current statute. That *all* such conduct giving rise to civil liability under the

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[5] Cong. Globe, *supra* note 2, at 317.

original section 2 also subjected the conspirators to severe criminal sanctions[6] is even more suggestive of the intended scope of the provision to be an extreme response to a drastic situation.

To find that § 1985(3) may be used to prevent abortion protest trespass is to ignore the historical context of this statute and what it was meant to remedy. It is a statutory remedy for federal intervention in a state emergency. Permitting federal intervention without the requisite state emergency under § 1985(3) gives the federal government a power which Congress never intended it to have.

A. THE FEDERAL GOVERNMENT IS ONLY TO BECOME INVOLVED UNDER § 1985(3) WHEN A STATE IS NO LONGER ABLE TO PROTECT THE CIVIL RIGHTS OF ITS CITIZENS

1. Insurrection During Reconstruction Was the Focus of the Statute

The mechanism which puts the statutory vehicle of § 1985(3) into motion is a state government which is unwilling or unable to enforce laws which protect the civil rights of its citizens. Because of the immediacy of the insurrection in the South, President Grant personally

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[6] Section 2 of the Act provided for fines of between $500 and $5,000, or imprisonment of between six months and six years or both. 17 Stat. 13 § 2 (1871).

requested prompt introduction in the House of the Ku Klux Klan Act.[7] The President's message read:

> To the Senate and House of Representatives: A condition of affairs now exists in some of the States of the Union rendering life and property insecure, and the carrying of the mails and the collection of the revenue dangerous. The proof that such a condition of affairs exists in some localities is now before the Senate. *That the power to correct these evils is beyond the control of the State authorities I do not doubt*: that the power of the Executive of the United States, acting within the limits of existing laws, is sufficient for present emergencies is not clear. Therefore, I urgently urge such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, *and the enforcement of law in all parts of the United States*. It may be expedient to provide that such law as shall be passed in pursuance of this recommendation shall expire at the end of the next session of Congress. There is no other subject upon which I would recommend legislation during the present session.

Cong. Globe, 42nd Cong., 1st Sess., at 236 (Senate); *Id*, at 244 (House) (emphasis added).[8] This message makes it clear that President Grant was concerned about ineffective state governments which were unable to secure the civil rights of their citizens because of Klan domination.

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[7] Act of April 20, 1871, ch.22, 17 Stat. 13. *See also* A. Avins, *The Reconstruction Amendments' Debates* (1967).

[8] The House passed a resolution that the message be referred to a select committee of nine members, who then reported H.R. 320 to the House for consideration. Cong. Globe, *supra* note 2, at 249, 317.

His recommendation that the Act expire after a year shows that he perceived the southern outrages to be an emergency situation which called for immediate, but temporary, federal intervention to assert control over a lawless state of affairs.

The Congressional Globe is replete with statements from Congressmen regarding conditions in the South. With regard to these conditions Congressman Tyner's remarks are typical:

> "In a large portion of the states lately in rebellion there is a condition of practical and positive insurrection. The courts are closed, juries intimidated or in complicity with the enemies of the government, the laws are silent, officers of justice overawed and the very genius of lawlessness and misrule triumph."

Cong. Globe, 42nd Cong., 1st Sess, at 487.

Section 1985(3) was envisioned as a statute to prevent the Klan from usurping legitimate government offices and authority. Republican Senator Osborn of Florida, for example, stated the Klan's "well defined and proven object is to gain political control by intimidation and murder." Cong. Globe, 42 Cong., 1st Sess., at 653. Republican Congressman Wilson of Indiana also stated in this vein: "And, sir, what is the purpose of this bloody work? I assert . . . that it is for the express purpose of controlling governments in the States." *Id*. at 484.

Therefore, § 1985(3) was never intended to be a statute to prevent protesters from sitting on the grounds of abortion facilities. Instead, it was designed to prevent the lawless domination of state officials and state

governments.[9] The sponsors of the Ku Klux Klan Act believed that the ultimate goal of the Klan's usurpation of power through terror and political subversion was to overthrow reconstruction policy, including the recent amendments to the Constitution, thereby withdrawing from the freedmen the equal protection of the laws and the equal privileges and immunities which that policy secured.[10] In the final speech before the Ku Klux Klan Act was first approved by the House, the sponsor of the bill, Congressman Shellabarger, outlined the Klan's long-range plans:

> Mr. Speaker, that I may make absolutely and utterly irresistible the proofs that these banded conspirators have the political aims I attribute to them, to wit, to 'trample into dust' these newly-acquired political rights of the freed man and

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[9] *See e.g.*, Cong. Globe, *supra* note 2. at 487 ("disorders are so great in some of the States as to paralyze the power of local authorities") (remarks of Congressman Tyner (R-Ind)); *id*. app. at 72 ("the Klans are powerful enough to defy the state authorities. . . . The states are prostrate before a power they cannot control") (remarks of Congressman Blair (R-Mich)); *id*. app. at 196 ("even now they are so powerful as to control State authority and prevent the execution of laws") (remarks of Congressman Snyder (R-Ark)).

[10] *See e.g.*, Cong. Globe, *supra* note 2, at 252 (remarks of Sen. Morton) ("The purpose [of the Klan] is by these innumerable and nameless crimes to drive those who are supporting the Republican party to abandon their political faith or to flee the State."); *id*. at 504 (remarks of Sen. Pratt) (the primary purpose of the Klan "is to punish men for their political opinions"); *id*. at 702 (remarks of Sen. Edmunds) (the "systematic plan [of the Klan] is not to leave in any of those States a brave white man who dares to be a Republican or a colored man who dares to be a voter").

> the constitutions and laws which confer them. I now call new and distinguished witnesses. Take this one first, that the Democratic party of this nation, 4th July, 1868, in national platform formally and solemnly announced . . . that 'we regard the reconstruction acts (so called) of Congress, as such, as usurpations and unconstitutional, revolutionary, and void.'

Cong. Globe, 42d Cong., 1st Sess., at 517 (1871).[11] Similarly, Congressman Coburn noted that the records of the War Department indicated that governors of eight states called for federal troops between 1868 and 1870 as a result of the states' inability to protect their citizens from violence. *Id*. at 457.

It is only in those situations where mass disorder threatens the very structure of a state that § 1985(3) allows federal intervention. An Operation Rescue demonstration simply does not threaten a state with the widespread and uncontrolled violence which is required for federal intervention under the statute.

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[11] *See also* Congressman Shellabarger's entire speech, Cong. Globe, *supra* note 2, at 516-519; *id*. at 195 ("It seeks to strike down your reconstruction laws and reduce the newly enfranchised race to a non-voting population.") (Remarks of Congressman Buckley (R-Ala)); *id*. app. at 201 (object of the Klan is the "overthrow of the whole system of reconstruction") (remarks of Congressman Snyder (R-Ark)). This view is corroborated by the testimony of the Democrats themselves: "No, sir; if lawlessness exists it results from the government set over them: it is the legitimate offspring of reconstruction." *Id*. at 421 (remarks of congressman Winchester (D-Ky)). Most historians support the Republicans' perception. *See e.g.* D. Chalmers, *Hooded Americanism* 10-21 (1965); J.H. Franklin, *Reconstruction* (1961).

2. Federal Intervention Was Only Viewed as Viable Under § 1985(3) When a State Is Unable to Secure the Rights of Its Citizens

The Ku Klux Klan Act was envisioned by its supporters to be an emergency mechanism to restore order and justice to an unruly South. Most supporters of the original bill, despite the proposed criminal sanctions contained within it, argued that the source of federal authority lay in the *de facto* denial of equal protection resulting from the failure of the Southern States to enforce the law against the Klan. The remarks of Congressman Blair stress this point:

> The courts are powerless to redress these wrongs, and the State governments fail to afford protection to the people. The Klans are powerful enough to defy the State authorities. In many instances they are the state authorities. And if you deny the General Government the authority to interfere, then there is no remedy anywhere. To wait until the State calls for assistance is to wait, in many instances, for a voice from the grave. The States are prostrate before a power they cannot control.

Cong. Globe App. at 72. Congressman Perry emphasized that:

> The domestic violence here provided for is obviously violence of a nature hostile to the State government. But if the violence be unlawful, and not hostile to the State government; if the State authorities be in complicity with it; if it be against the rights secured by the constitution and laws of the United States, it is, of course, not merely domestic to the State, but hostile to the power of the Federal Government, and in the nature of insurrection or rebellion.

Cong. Globe App. at 79. *See also* (remarks of Congressman Lowe) Cong. Globe at 375, (remarks of Congressman Beatty) *id*. at 428-429, (remarks of Congressman Butler) *id*. at 448, (remarks of Congressman Coburn) *id*. at 459. Typical is the statement of Rep. Hoar that "[t]o authorize the interference of congress there must be, not merely those imperfections and failures in the administration of law which are attendant upon all civil governments alike, but there must be a clear case of denial of government." Cong. Globe at 334.

There has been no denial of protection of civil rights on the part of the Commonwealth of Virginia in this case. Nor has there been a threat that State officials would be unwilling to issue an injunction to stop unlawful protest, or unable to enforce the state's laws. Stated simply, there has been no basis upon which to invoke the drastic statutory mechanism of § 1985(3).

The severely circumscribed conditions justifying invocation of § 1985(3) was voiced by moderate Republican Congressmen who believed that the original draft of the Ku Klux Klan Act went too far in legislating matters within the exclusive province of the states. Congressman (later President) Garfield said in this regard:

> Now, Mr. Speaker, I call the attention of the House to the third section of the bill, I am not clear as to the intention of the committee, but if I understand the language correctly, this section proposes to punish citizens of the United States for violating State laws. If this be the meaning of the provision, then whenever any person violates a State law the United States may assume jurisdiction of his offense. This would virtually abolish the administration of justice under State law. In so far as this section punishes persons who under color of any State law shall deny or

> refuse to others the equal protection of the laws I give it my cheerful support; *but when we provide by congressional enactment to punish a mere violation of a State law, we pass the line of constitutional authority.*

Cong. Globe at 154 (emphasis added). Congressman Cook, whom Congressman Shellabarger credited with drafting the "equal protection" language of section 2 of the Ku Klux Klan Act, reinforced the notion that the Act was not intended to circumvent a state's authority unless egregious circumstances existed:

> I think it is within the power of Congress to protect and enforce every right secured to American citizens by the Constitution of the United States. I do not believe, and I do not know of any man who does believe, in the language of the gentleman who just addressed the House, that congress has a right to punish an assault and battery when committed by two or more persons within a State. *I know of no one who believes that Congress has any right to enforce the laws of a State except in the emergency contemplated in the Constitution, when the State may be unable to do so by reason of lawless combinations too strong for the State authorities to suppress. The statement that this bill aims at any such end is an utter misstatement of its object and effect.* The proposition we maintain is that whenever the Constitution of the United States secures a right to a citizen Congress may enforce and protect that right.

Cong. Globe at 485 (emphasis added).[12] When the amendment to section 2 to the Ku Klux Klan Act was proposed,

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[12] Congressman Cook clarified this point in a dialogue with Congressman Eldridge, a Democrat from Wisconsin:

(Continued on following page)

Republicans who had opposed the original draft expressed their support for the amendment and repeated their understanding that the Ku Klux Klan Act is only operative in those situations where a state can no longer secure the rights of its citizens. Congressman Willard said in this regard:

> The internal affairs of a State, its police regulations, *and all laws for the protection of society or the person and property of individuals against lawless violence, are matters of State concern, and entirely outside of any powers conferred upon the General Government.* Certain specified crimes, as treason and counterfeiting and offenses against the laws of the United States, the General Government has jurisdiction of and can punish; but it can no more punish offenses against life and property, as such, than it can regulate the distribution of property of estates, the enforcement of civil contracts, the matters of taxation, or proceedings in courts in the States. *The individual, for all purposes except for the purpose of carrying into effect the Constitution of the United States and the laws in pursuance thereof, looks to the State Government for protection, and can have it nowhere else;* and in the minds of those who framed the Constitution probably no belief was firmer than that for all time it was much safer to leave the states to

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(Continued from previous page)

Mr. Eldridge. Suppose two men should inspire to commit an assault and battery on a person, or to take away any of his rights of property or liberty, can the United States redress that wrong?

Mr. Cook. Only in case the emergency has arisen, contemplated in the Constitution, in which the aid of the national Government may be invoked in aid of State laws. [Cong. Globe, *supra* note 1, 485]

> protect the rights of the people than to place that duty upon the General Government. I believe that in this they were especially wise; but whether wise or not, I have no doubt that they had that opinion and made the Constitution to conform to it.

Cong. Globe at 187 (emphasis added). Congressman Buchard announced his support of the Act based on the understanding that there must initially be a showing of a lack of justice at the state level prior to federal intervention under the Act:

> That Amendment obviates in a great measure the objections and the doubtful construction as to the extent of jurisdiction for the punishment of crimes intended by the bill. It is not denial of protection but of equality of protection, which constitutes the offense against the United States. *The conspiracies it seeks to punish are those designed to prevent the equal and impartial administration of justice.* These are essentially different from combinations and conspiracies to resist the execution of ordinary process. They must be aimed to prevent the enjoyment of equal civil rights. *The gravamen of the offense is the unlawful attempt to prevent a State through its officers enforcing in behalf of a citizen of the United States his constitutional right to equal protection.* It is this view that this legislation is competent. The civil rights and enforcement bills heretofore passed provided for the punishment of those laws of a State in conflict with the constitution of the United States. Is not an individual acting as a State officer, upon whom, as such officer, the constitution and laws of the United States impose the performance of those duties, also amenable to the laws of the United States for their nonperformance? If the refusal of a State officer, acting for the State, to accord equality of civil

> rights renders him amenable to punishment for the offense under United States law, conspirators who attempt to prevent such officers from performing such duty are also clearly liable.

Cong. Globe App. at 315. Congressman Poland, as well, expressed his opposition to the original bill and his support for the amended version as meeting constitutional standards because its provisions could only be invoked in extraordinary circumstances of state lawlessness:

> [T]he last clause of the fourteenth amendment provides that no state shall deny the equal protection of the laws to its citizens. Now, in my judgment, that is a constitutional enactment that each State shall afford to its citizens the equal protection of the laws. *I cannot agree with several gentlemen upon my side of the House who insist that if the State authorities fail to punish crime committed in the State therefore the United States may step in and by a law of Congress provide for punishing that offense; I do not agree with those gentlemen.*
>
> *But I do agree that if a State shall deny the equal protection of the laws, or if a State make proper laws and have proper officers to enforce those laws, and somebody undertakes to stay and clog justice by preventing the State authorities from carrying out this constitutional provision, then I do claim that we have the right to make such interference an offense against the United States;* that the Constitution does empower us to aid in carrying out this injunction, which by the Constitution, we have laid upon the States, that they shall afford the equal protection of the laws to all their citizens.

Cong. Globe at 514 (emphasis added).

In sum, a § 1985(3) enforcement mechanism becomes operative only when a state is unable or unwilling to enforce civil rights on its own. As Senator Frelinghuysen

said before the Joint Committee on Southern Disorders: "[t]he Federal Government should only interfere to protect the citizen of the United States in his privileges when the State clearly and persistently fails to do so." Cong. Globe at 501. No such chain of events warranting federal intermeddling in a purely state affair occurred in the present case.

B. BOTH VIRGINIA AND THE SEVERAL STATES OF THE UNION GENERALLY ARE ACTING TO PROTECT SUCH RIGHTS AS WOMEN SEEKING ABORTIONS CLAIM TO HAVE SUFFICIENT TO PRECLUDE INVOCATION OF § 1985(3).

Unlike the situation that existed in the South in 1871, state and local authorities in Virginia have not absolutely failed nor have they shown an inability to protect their citizens and to insure them the free and unrestrained exercise of their civil rights. Neither the Commonwealth of Virginia, nor for that matter, any state of the Union, is today seething in lawlessness, ruled by marauding bands of terrorists, or plagued by widespread killings of its public officials. Thus, the indispensable prerequisite triggering the operation of § 1985(3) simply does not exist. That such state inaction is the *sine qua non* to invocation of § 1985(3) was recognized by Justice Blackmun in his dissenting opinion in *Carpenters, supra,* where, joined by Justices O'Connor, Brennan and Marshall, he wrote that:

> The critical consideration is the 42d Congress' perception that the atrocities perpetrated by the Klan were injuring persons who, largely because of their political affiliation, were unable to demand protection from local law enforcement officials.

463 U.S. 825, 853 (1983).

The evidence adduced in the district court reflects that Virginia law enforcement authorities acted promptly and vigorously to provide Respondents with all the protection in the exercise of their civil rights to which they claimed they were entitled. As the record reflects, 387 pro-life demonstrators were arrested during three separate rescue operations at the Commonwealth Women's Clinic through the combined efforts of five law enforcement agencies which included the Falls Church Police Department, the Arlington County Sheriff's Department, the Arlington County Police Department, the Virginia State Police and the Virginia Department of Corrections. At the largest demonstration, approximately 240 demonstrators were arrested and charged with trespass and unlawful assembly. The arrest process consumed two and half hours at the scene during which the clinic was closed for between thirty to forty-five minutes. (Tr. 49-54). It can hardly be suggested that such a massive law enforcement response resulting in the arrest of nearly four hundred persons for alleged violations of state laws is indicative of the complete failure of state and local law enforcement authorities to act in a manner sufficient to invoke the provisions of § 1985(3).

The actions taken by state and local law enforcement officials in this case are typical of the actions taken by law enforcement officials throughout the Commonwealth of Virginia. In fact, these actions are typical of law enforcement officials nationwide. Throughout the country, pro-life demonstrators have been arrested, sentenced to jail, and fined. *See People v. Smith,* 514 N.E.2d 211 (Ill.App. 1987) (pro-life activist convicted of criminal trespass); *People v. Krizk,* 416 N.E.2d 36 (Ill.App. 1981) (pro-life

activists convicted of criminal trespass); *Commonwealth v. Wall*, 539 A.2d 1325 (Pa.Super. 1988) (pro-life activists convicted of criminal trespass and defiant trespass; one defendant sentenced to not less than six nor more than twelve months in prison); *Cleveland v. Municipality of Anchorage*, 631 P.2d 1073 (Alaska 1981) (pro-life activists convicted of criminal trespass); *Crabb v. State*, 754 S.W.2d 742 (Tex.Crim.App. 1988) (pro-life activists convicted of criminal trespass; one defendant sentenced to 90 days in jail and fined $200.00, and five sentenced to 180 days in jail and fined $900.00 each); *City of St. Louis v. Klocker*, 637 S.W.2d 174 (Mo.App. 1982) (pro-life activists convicted of trespass and fined $50.00 each); *Hoffart v. State*, 686 S.W.2d 259 (Tex.Crim.App. 1985) (pro-life activists convicted of criminal trespass, sentenced to 30 days in jail, and fined $500.00); *Erlandson v. State*, 763 S.W.2d 845 (Tex.Crim.App. 1988) (pro-life activists convicted of criminal trespass, sentenced to 180 days in jail and fined $500.00 each); *Reproductive Health Services v. Lee*, 660 S.W.2d 330 (Mo.App. 1983); *Bobo v. State*, 757 S.W.2d 58 (Tex.Crim.App. 1988) (pro-life activists convicted of criminal trespass, received jail sentences ranging from 90 to 180 days, and fined in amounts ranging from $650.00 to $1,000.00); *Brown v. Davis*, 495 A.2d 900 (N.J.Super.Ct. 1984) (pro-life activists arrested and charged with criminal trespass; efforts to enjoin prosecution denied); *State v. Migliorina*, 442 N.W.2d 36 (Wis. 1989) (pro-life activist convicted of criminal trespass); *Gaetano v. United States*, 406 A.2d 1291 (D.C.App. 1979) (pro-life activists convicted of criminal trespass).

In addition to the imposition of criminal sanctions, state courts have entered injunctions against pro-life

activists by placing restrictions upon their right to demonstrate outside abortion facilities. *See Right to Life Advocates, Inc. v. Aaron Women's Clinic*, 737 S.W.2d 564 (Tex.Ct.App. 1987); *Kugler v. Ryan*, 682 S.W.2d 47 (Mo.App. 1984); *Chico Feminist's Women's H. Ctr. v. Scully*, 256 Cal.Rptr. 194 (Cal.App. 1989); *Planned Parenthood Ass'n of Cincinnati, Inc. v. Project Jericho*, 556 N.E.2d 156, *reh'g denied*, 558 N.E.2d 61 (Ohio 1990); *Crozer Chester Medical Ctr. v. May*, 506 A.2d 1377 (Pa.Super. 1986); *Planned Parenthood of Monmouth County v. Cannizzaro*, 526 A.2d 741 (N.J.Super.Ct.App. 1987), *aff'g*, 499 A.2d 535 (N.J.Super.Ch. 1985); *Bering v. SHARE*, 721 P.2d 918 (Wash. 1986); *Family Way Family Physicians, Inc. v. Tacoma Stands Up For Life*, 721 P.2d 946 (Wash. 1986); *Planned Parenthood League of Mass. v. Operation Rescue*, 550 N.E.2d 1361 (Mass. 1990); *Hirsh v. City of Atlanta*, No. S90A1387, S90A1494 (Ga.Mar. 15, 1991); *Dayton Women's H. Ctr. v. Enix*, 556 N.E.2d 956, *reh'g denied*, 558 N.E.2d 61 (Ohio 1990); *Parkmed Co. v. Pro-life Counseling, Inc.*, 442 N.Y.S.2d 396, *modified*, 457 N.Y.S.2d 27 (Sup.Ct. 1982); *O.B.G.Y.N. Ass'n. v. Birthright of Brooklyn and Queens, Inc.*, 407 N.Y.S.2d 903 (Sup.Ct.App.Dis. 1982); Unreported Cases, *Women's Medical Center of Providence, Inc. v. Barry*, No. 86-1964 (R.I.Sup.Ct.Aug. 18, 1987), *remanded*, 551 A.2d 14 (R.I. 1988); *Women's Health Center of West Virginia, Inc. v. Kopp*, No. 90-C-375 (W.Va.Circ.Ct.Feb. 2, 1990); *Planned Parenthood of Santa Barbara, Ventura and San Luis Obispo Counties, Inc. v. Aakus*, No. 178746 (Cal.Sup.Ct.Feb. 23, 1990).

It is thus abundantly clear that law enforcement officials and state courts across the country are acting effectively to insure that such rights as women wishing

abortions claim to have are more than adequately protected. Indeed, at least two states, Maryland and Wisconsin, have enacted trespass statutes specifically aimed at medical facilities and containing penalties providing for both jail sentences and fines. The widespread mob violence, lawlessness, and rebellion which prompted Congress to act one hundred twenty years ago in the enactment of the Ku Klux Klan Act is absent today. Regardless of the claimed right, Respondents have no basis to argue that their beliefs or associations place them in danger of not receiving the equal protection of the laws from local authorities. *See, Carpenters*, at 853 (Blackmun, J. dissenting).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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